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Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

JOSEPH PATRICK DOHERTY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

JULIAN FLEET
FERNANDO CHANG-MUY
UNITED NATIONS
HIGH COMMISSIONER
FOR REFUGEES

Of Counsel:
GUY S. GOODWIN-GILL
RALPH G. STEINHARDT

June 5, 1991

O. THOMAS JOHNSON, JR.*
ANDREW I. SCHOENHOLTZ
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5170
Attorneys for Amicus Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS

This brief is submitted *amicus curiae* by the Office of the United Nations High Commissioner for Refugees, with the consent of the parties.

The Office of the United Nations High Commissioner for Refugees (UNHCR) has been charged by the United Nations General Assembly with the responsibility of providing international protection to refugees and other per-

sons within its mandate [1] and of seeking durable solutions to the problems of refugees by assisting governments and private organizations.[2] The Statute of the Office of the High Commissioner specifies that the High Commissioner shall provide for the protection of refugees falling under the competence of the Office by, *inter alia*:

> "Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto. . . ." [3]

The supervisory responsibility of UNHCR and the obligation of States to cooperate with UNHCR are formally recognized in Article II, paragraph 1, of the 1967 United Nations Protocol relating to the Status of Refugees (1967 Protocol), to which the United States became a Party in 1968:

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[1] Persons falling within the competence of the High Commissioner include refugees, asylum-seekers, and certain other persons in refugee-like situations. *See* U.N. General Assembly Res. 428(V) 1950; Annex: Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR Statute), ¶ 6 n.1. In the instant case, the Attorney General has "assumed, *arguendo*, that respondent satisfied the threshold eligibility requirement of being a refugee." Petitioner's Reply Brief (Pet. Reply Brief) at 6 n.1. In granting Mr. Doherty's motion to reopen his asylum proceedings, the Board of Immigration Appeals (BIA) concluded that he had established a *prima facie* claim of a well-founded fear of persecution. Petition App. 99a. For these reasons also, Mr. Doherty is a person of concern to UNHCR. However, because Mr. Doherty has not yet been afforded an opportunity to present the facts of his refugee claim in the usual procedure of a hearing before an immigration judge, and therefore has not actually had his refugee status determined, UNHCR takes no position on the specific facts of this case or on the particular merits of Mr. Doherty's claim of refugee status.

[2] UNHCR Statute at ¶ 1.

[3] *Id.* at ¶¶ 8(a) and (d).

> "The States Parties to the present Protocol undertake to cooperate with the Office of the [UNHCR] . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol." [4]

The present case, concerning as it does the interpretation of statutory provisions and international treaty obligations deriving from the 1951 Convention relating to the Status of Refugees (1951 Convention), through the 1967 Protocol, raises questions involving the essential interests of refugees within the mandate of the High Commissioner. Its resolution is likely to affect the interpretation by the United States of the 1967 Protocol with regard to the determination of refugee status and the grant of asylum and withholding of deportation to those who qualify for such status.

Moreover, the decision in this case—particularly if the Court finds it necessary to reach the question of whether the Attorney General may properly consider foreign policy in denying asylum—can be expected to influence the manner in which the authorities of other countries make asylum decisions and apply international instruments and principles related to refugee protection. A decision by this Court broadly authorizing the interjection of foreign policy concerns as a basis for denying asylum or avoiding obligations set out under the 1951 Convention can be expected to undermine the international recognition of the social and humanitarian nature of the problem of refugees and to impede the ability of the High

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[4] Protocol relating to the Status of Refugees, Nov. 1, 1968, 19 U.S.T. 6223, T.I.A.S. No. 6577. Under Article I(1) of the 1967 Protocol, the United States has agreed to apply Articles 2 to 34 inclusive of the 1951 United Nations Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. Petitioner has acknowledged that the relevant provisions of the 1951 Convention are binding upon the United States as a result of this country's accession to the 1967 Protocol. See Petitioner's Brief on the Merits (Pet. Brief) at 30.

Commissioner to fulfill her mandate to provide for the international protection of refugees.

For these reasons, UNHCR respectfully submits this brief in support of the interpretation of the relevant statutory provisions and international treaty obligations deriving from the 1951 Convention and 1967 Protocol that was adopted by the United States Court of Appeals for the Second Circuit in the decision below.

SUMMARY OF ARGUMENT

Petitioner claims that a primary issue in this case is whether the Attorney General may base asylum decisions on foreign policy criteria. In this brief, UNHCR will demonstrate that it is both premature and unnecessary for the Court to reach this issue. Rather, the issue here is whether the Respondent should receive a hearing and an opportunity to present the facts of his claim for asylum and withholding of deportation prior to any determination that he is ineligible for such protection.

We argue below that the Court of Appeals correctly remanded this case for a hearing. Such a hearing will provide a proper basis for the authorities to determine whether Respondent is a refugee or is excluded from the protection of the 1951 Convention because of his past conduct. The 1951 Convention, the 1967 Protocol, and the 1980 Refugee Act already provide the analytical framework for excluding undeserving individuals from the protection afforded refugees. If this Court affirms the Court of Appeals on this basis, it need not reach the issue of the Attorney General's power to base asylum decisions on foreign policy concerns.

Even if the Court upholds the Attorney General's determinations without a hearing, which it should not, it is totally unnecessary to reach the foreign policy issue. If Respondent is not eligible for withholding of deportation on either of the two grounds cited by the Attorney

General, he effectively would be excluded from asylum as well.[5]

This brief will show first that, pursuant to international law and well-established international standards, asylum-seekers are entitled to present their individual claims at a meaningful hearing. Respondent should be accorded such a hearing.

Second, UNHCR will demonstrate that since the 1951 Convention, the 1967 Protocol, and the Refugee Act of 1980 provide the analytical framework to determine whether past conduct excludes a person from refugee status and therefore asylum, it is not necessary for this Court to authorize the politicization of asylum determinations in order for the Attorney General to deny asylum to undeserving individuals.

Finally, this brief will show that the international protection of refugees established by the 1951 Convention and the 1967 Protocol is based exclusively on non-political criteria. The letter and spirit of the Convention, the Protocol, and related international instruments and standards are based on the principle that the recognition of refugee status and the grant of asylum are peaceful, non-political, and humanitarian acts that cannot be regarded as unfriendly by any State. In other words, States should not treat the granting of asylum as an act implicating foreign policy concerns. Moreover, the international system established to protect refugees will be substantially undermined if governments deny asylum based on foreign policy criteria. For these reasons, foreign policy considerations are not a proper basis for denying asylum.

The decision of the Court below should, therefore, be affirmed.

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[5] Although the instant case involves an individual convicted abroad of murder, the broad authority which Petitioner seeks from this Court to interject "foreign policy concerns" into asylum determinations could affect untold numbers of asylum-seekers whose claims are not so provocative or complex.

ARGUMENT

I. THE COURT BELOW CORRECTLY DETERMINED THAT RESPONDENT SHOULD RECEIVE A HEARING SINCE, UNDER INTERNATIONAL LAW AND WELL-ESTABLISHED INTERNATIONAL STANDARDS, AN ASYLUM-SEEKER IS ENTITLED TO AN EVIDENTIARY HEARING TO DETERMINE REFUGEE STATUS AND ELIGIBILITY FOR INTERNATIONAL PROTECTION.

In granting Respondent a hearing on his claims for asylum and withholding of deportation, the Board of Immigration Appeals (BIA) stated:

> "The [Immigration and Naturalization] Service has alleged that the Respondent has engaged in conduct which renders him either ineligible for withholding or unworthy of the benefit of asylum. The Service will have the opportunity to prove its allegations upon reopening of the proceedings."

Petition App. 100a. In reversing the BIA decision, the Attorney General denied Respondent a hearing because he concluded *inter alia* that Respondent was ineligible for withholding of deportation based largely on evidence introduced in the asylum case of another individual. *See* Petition App. 85a. Under international law and widely accepted procedural standards, however, an asylum-seeker is entitled to an evidentiary hearing.

A. This Court has Found that Congress Intended to Conform United States Law to the Provisions of the 1951 Convention and the 1967 Protocol.

In 1968, the United States acceded to the 1967 Protocol.[6] It is axiomatic that, in passing the 1980 Refugee Act,[7] Congress intended to conform United States domestic

[6] As of 28 May 1991, 107 States were parties to the 1951 Convention and/or the 1967 Protocol.

[7] Pub. L. No. 96-212, 94 Stat. 102, *et seq.*

law with its international obligations under the 1967 Protocol and directed that it should be interpreted consistently with that international instrument. This Court itself has concluded:

> "If one thing is clear from the legislative history of the new definition of 'refugee,' *and indeed the entire 1980 Act*, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968."

Immigration and Naturalization Service v. *Cardoza-Fonseca*, 480 U.S. 421, 436-437 (1987) (emphasis added).[8]

The changes worked by the 1980 Refugee Act were fundamental. First, Congress redefined "refugee" to "finally bring United States law into conformity with the internationally-accepted definition of the term 'refugee' set forth in the 1951 United Nations Refugee Convention and Protocol. . . ."[9] Second, responding to developing international standards and refugee needs, Congress incorporated an asylum provision in the legislation for refugees who meet this international definition.[10]

[8] This would be the case even in the absence of express Congressional intent, since the statute must be construed consistently with international law. *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (the statute "ought never be construed to violate the law of nations, if any other possible construction remains").

[9] H.R. Rep. No. 96-608, 96th Cong., 1st Sess. (1979) at 9; S. Rep. No. 96-590, 96th Cong., 2nd Sess. (1980) at 19. For similar contemporary statements, see *Joint Explanatory Statement of the Committee of Conference*, H.R. Rep. No. 96-781, 96th Cong., 2nd Sess. (1980) at 19; S. Rep. No. 96-256, 96th Cong., 1st Sess. (1979) at 4.

[10] H.R. Rep. No. 96-608, *supra*, at 17-18.

The language chosen by Congress in 1980 to define "refugee" tracks virtually verbatim the corresponding provisions of the 1967 Protocol. *Cardoza-Fonseca*, 480 U.S. at 437; compare 19 U.S.T. 6261, T.I.A.S. No. 6577, with Section 101(a)(42)(A) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(42)(A) (1991). By establishing a remedy of asylum based on this definition,[11] Congress clearly intended to make U.S. refugee and asylum law consistent with its international obligations.[12]

There can be no doubt, then, that the refugee laws at issue in this case must be interpreted consistently with the provisions of the 1951 Convention and the 1967 Protocol.

B. The Definition of "Refugee" Contained in the 1951 Convention, the 1967 Protocol, and the Refugee Act of 1980 Requires an Individualized Assessment of Refugee Status.

The 1951 Convention and 1967 Protocol represent the international community's legal, social and humanitarian response to the plight of refugees. With these treaties, the international community agreed upon a universal and individualized definition of "refugee."

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[11] Section 208(a) of the INA, 8 U.S.C. § 1158(a), provides that an applicant "may be granted asylum in the discretion of the Attorney General if the Attorney General determines that [the applicant] is a refugee within the meaning of section 1101(a)(42)(A)."

[12] As this Court observed in *Cardoza-Fonseca*, the Conference Committee Report "stated that the definition was accepted 'with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.' S. Rep. No. 96-590, p. 29 (1980); see also H.R. Rep. 9." *Cardoza-Fonseca*, 480 U.S. at 437.

An essential element of the definition is the individual's well-founded fear of persecution.[13] The individualized character of the definition is paramount:

> "The phrase 'well-founded fear of being persecuted' is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by categories . . . [with] the general concept of 'fear' for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements . . . ." [14]

In this way, the definition itself requires that the authorities assess an individual's claim to refugee status on the basis of that person's fear. As a recognized authority on international refugee law has noted, the refugee definition "is essentially individualistic, requiring a case by case examination of subjective and objective elements." [15]

Such an individualized assessment can only occur after an applicant has presented the facts of his claim in as complete a manner as possible.

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[13] The asylum-seeker's individualized fear of persecution is relevant to the threshold determination of whether he satisfies the requirements of the definition, including the determination of whether he is excluded from the definition because of past conduct. *See* G.S. Goodwin-Gill, *The Refugee in International Law* 61-62 (1983) (in the context of exclusion from refugee status and its concomitant legal protection, "the claim to be a refugee can rarely be ignored, for a balance must also be struck between the nature of the offence committed and the degree of persecution feared").

[14] UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) ¶ 79.

[15] Goodwin-Gill, *supra*, at 6.

C. Well-Established International Standards Require that an Asylum-Seeker be Given an Evidentiary Hearing to Determine Refugee Status and Eligibility for International Protection.

Under widely accepted procedural standards, determination of refugee status and eligibility for international protection require a full opportunity for presentation of the facts underlying Respondent's claims. Because no hearing has been provided and no proper factual record developed, substantial questions of fact regarding Respondent's eligibility for refugee status and its accompanying protection remain unanswered.

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status (Handbook)* (1979) delineates standards and basic procedural safeguards for determining refugee status and the concomitant eligibility for international protection.[16] Both the UNHCR *Handbook* and the Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme (Executive Committee Conclusions)[17] make clear that the refugee definition set out in the 1951 Convention and 1967 Protocol would be rendered virtually meaningless unless asylum-seekers are given full opportunity to present their claims.

The process of refugee status determination occurs in two stages.[18] First, "it is necessary to ascertain the relevant facts of the case. Secondly, the definitions of the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained." [19]

In guiding States on how to "ascertain the relevant facts," the entire second part of the *Handbook*, ¶¶ 189-219, is devoted to emphasizing the requirement of fair procedures in refugee and asylum determinations. Although it is left to each State "to establish the procedure that it considers most appropriate," [20] the *Handbook* sets

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[16] The *Handbook* was prepared by UNHCR at the request of States Members of the Executive Committee of the High Commissioner's Programme (Executive Committee) for the guidance of governments. *See* Executive Committee Conclusions No. 8 (XXVIII), Report of the 28th Session of the Executive Committee of the High Commissioner's Programme, UN Doc. A/AC. 96/549 (1977) at ¶ 53.6(g). The *Handbook* is based on UNHCR's experience, including the practices and procedures of States and the UNHCR Office in determining refugee status, exchanges of views between the Office and the competent authorities of Contracting States, and the literature devoted to the subject over many years. *Handbook*, at 1. It has been widely circulated, and applied by governments and in many judicial decisions, including decisions of this Court. *See* Report of the 30th Session, UN Doc. A/AC. 96/572 (1979) at ¶¶ 68, 72(i)(L); Report of the 31st Session, UN Doc. A/AC. 96/588 (1980) at ¶ 36. As this Court has observed, "the *Handbook* provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *Cardoza-Fonseca*, 480 U.S. at 439 n.22 (citations omitted). Both the U.S. courts and the BIA have frequently turned to the *Handbook* for guidance in the interpretation of the 1967 Protocol. *See, e.g., Canas-Segovia* v. *I.N.S.*, 902 F.2d 717, 721, 724-25, 729 (9th Cir. 1990); *Ananeh-Firempong* v. *I.N.S.*, 766 F.2d 621, 626, 628 (1st Cir. 1985); *Matter of Izatula*, Int. Dec. 3127 (BIA 1990); *Matter of Frentescu*, 18 I&N 244 (BIA 1982).

[17] The Executive Committee Conclusions, customarily adopted by consensus of the 44 States members (including the U.S.), evidence an important measure of State support for particular protection practice and standards, and contain international guidelines which can serve as a basis for States when developing or orienting their national policies on refugee issues.

[18] However, entitlement to international protection accrues as soon as an individual fulfills the criteria contained in the refugee definition, which necessarily occurs prior to the time at which refugee status is formally determined by a State or other competent authority. *Handbook* ¶ 28.

[19] *Id.* at ¶ 29.

[20] *Id.* at ¶ 189. UNHCR expresses no opinion on the applicability of *I.N.S.* v. *Abudu*, 485 U.S. 94 (1988) to this case except to note that the Executive Committee has advised that claims for

out the minimum procedural safeguards that will enable the necessary facts to come to light.

First, all applicants for refugee status should be given the necessary facilities to present their claims.[21] "The relevant facts of the individual case will have to be furnished in the first place *by the applicant himself*."[22] "[W]hile the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application." [23]

Thus, the principles and methods discussed by the *Handbook* concentrate on burden of proof and credibility —evidentiary matters that would be wholly irrelevant if a hearing were not a necessary part of the refugee and asylum determination process.

Even in approaching manifestly unfounded claims, the Executive Committee concluded that "as in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview. . . ." [24] Here, where the BIA determined that Respondent demonstrated a *prima facie* claim, Petition App. 99a, *a fortiori* Respondent should have the opportunity to present the facts of his case.

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asylum should not be foreclosed or rejected on formalistic grounds. Executive Committee Conclusions No. 15 (XXX), Report of the 30th Session of the High Commissioner's Programme, U.N. Doc. A/AC. 96/572 (1979) ¶ 72.

[21] *Handbook* ¶ 192.

[22] *Id.* at ¶ 195 (emphasis added).

[23] *Id.* at ¶ 196.

[24] Executive Committee Conclusions No. 30 (XXXIV), Report of the 34th Session of the High Commissioner's Programme, UN Doc. A/AC. 96/631 (1983).

In this instance, the Attorney General appeared to treat Mr. Doherty's refugee determination as if it were a criminal action where "probable cause" based largely on information supplied by persons other than the alleged criminal may be sufficient to issue a warrant for arrest.[25] But that approach does not conform to international procedural standards for the determination of refugee status.

United States asylum procedure implements an international law based on humanitarian principles. This law, *inter alia*, prohibits Contracting States from expelling or returning a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." [26] It is a law under which the applicant should be given the benefit of the doubt as to proof:

> "After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above . . . it is hardly possible for a refugee to 'prove' every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt." [27]

In sum, refugee status and asylum cannot be decided in the absence of an opportunity for a full presentation of the claim by the asylum-seeker to the proper authorities. Even "the non-fulfillment of . . . formal require-

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[25] The Attorney General relied heavily on evidence submitted in two decisions concerning a different asylum-seeker, *Matter of McMullen*, 19 I&N Dec. 90 (BIA 1984) and *McMullen* v. *I.N.S.*, 788 F.2d 591 (9th Cir. 1986). Petition App. 85a. That evidence has not been introduced in this case.

[26] Article 33(1) of the 1951 Convention.

[27] *Handbook* ¶ 203.

ments should not lead to an asylum request being excluded from consideration." [28]

Accordingly, Respondent should be given the opportunity to present his claim for asylum and withholding of deportation in a hearing before an Immigration Judge.

II. IT IS UNNECESSARY FOR THIS COURT TO AUTHORIZE THE POLITICIZATION OF ASYLUM DETERMINATIONS IN ORDER FOR THE ATTORNEY GENERAL TO DENY REFUGEE STATUS AND ASYLUM TO UNDESERVING INDIVIDUALS.

A. Under the 1951 Convention, the 1967 Protocol, and the 1980 Refugee Act, Determination of Refugee Status First Requires an Individualized Analysis of Whether the Asylum-Seeker Satisfies the Inclusion Clauses of the Refugee Definition; No Such Determination Has Yet Been Made Here.

The Attorney General assumed for the purposes of this case that Mr. Doherty "satisfied the threshold eligibility requirement of being a refugee," as the BIA had found. Petition App. 82a-83a; Pet. Reply Brief at 6 n.1. However, no determination has yet been made as to whether Respondent actually satisfies the requirements of the Convention's inclusion clauses [29] or as to the degree of persecution which he can establish. The importance of this determination—both to the integrity of the procedure and to the ultimate determination of whether he should be excluded from refugee status—cannot be understated.

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[28] Executive Committee Conclusions No. 15, *supra*.

[29] The refugee definition consists *inter alia* of "inclusion" and "exclusion" clauses. The inclusion clauses provide the positive criteria of the definition (*i.e.*, fear of persecution on account of the five enumerated grounds). The exclusion clauses have a negative significance and enumerate the circumstances (*i.e.*, commission of certain crimes or acts) in which a person is excluded from the application of the 1951 Convention although meeting the positive criteria of the inclusion clauses. *Handbook* ¶¶ 30-31.

Without satisfying the inclusion clauses, Respondent *ab initio* is not entitled to protection under the Convention and the Protocol. If he does satisfy the inclusion clauses, the degree of persecution which he can establish must be balanced against his past conduct to determine whether he should be excluded from refugee status and its accompanying rights and benefits.[30]

The asylum-seeker must show that, owing to a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion," he is outside the country of nationality and unable, or owing to such fear, unwilling to avail himself of the protection of that country.[31]

Such a determination should be made in the first instance. As the UNHCR *Handbook* explains, this analysis should be conducted even for persons who have resorted to force or committed acts of violence:

> "An application for refugee status by a person having, or presumed to have, used force or committed acts of violence must in the first place—like any other application—be examined from the standpoint of the inclusion clauses in the Convention." [32]

In short, to determine whether an applicant for refugee status is undeserving of protection, an initial determination based on a full presentation of the facts should be made as to whether that individual satisfies the requirements of the inclusion clauses. That initial determination has not yet been made in this case.[33]

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[30] *Id.* at ¶¶ 152, 156; *see* Goodwin-Gill, *supra*, at 61-62.

[31] Art. 1(A)(2) of the 1951 Convention.

[32] *Handbook* ¶ 176.

[33] The BIA determination that Respondent demonstrated a *prima facie* claim based on a well-founded fear of persecution was made in the context of Respondent's motion to reopen his asylum proceedings. However, no hearing on the merits was conducted.

B. Under the 1951 Convention, the 1967 Protocol, and the Refugee Act of 1980, Determination of Refugee Status Requires an Analysis of Whether the Asylum-Seeker is Undeserving of Such Status Based on Past Conduct and Therefore Effectively Excluded from Withholding of Deportation and Asylum.

The Attorney General denied withholding of deportation in this case based on his determination that: (1) there were serious reasons for considering that Mr. Doherty had committed a serious non-political crime, and (2) Mr. Doherty had assisted, or otherwise participated, in the persecution of others on account of political opinion. Petition App. 88a-89a.[34] In reaching this decision without a hearing, the Attorney General relied heavily on evidence introduced in the case of another asylum applicant. Petition App. at 84a-85a.[35]

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[34] The mandatory relief of withholding of deportation under Section 243(h) of the INA, 8 U.S.C. § 1253(h), is the domestic law analogue to Article 33(1) of the 1951 Convention, which proscribes the return (*"refoulement"*) of a refugee to a territory where his life or freedom would be threatened on account of any of the five grounds enumerated in the refugee definition. The statute lists four grounds in paragraph 2 upon which individuals are not entitled to this relief. Paragraphs 2(B) and 2(D) duplicate the grounds found in Article 32(2) of the 1951 Convention. The Attorney General did not rely on these grounds in denying withholding of deportation to Mr. Doherty. Rather, he based his decision on Paragraphs 2(A) and 2(C).

Paragraph 2(A) of the withholding provision excludes those who participate in the persecution of others on account of race, religion, nationality, membership in a particular social group, or political opinion. This provision corresponds generally to the kind of acts contemplated under the Convention's exclusion clauses 1(F)(a) and (c) concerning crimes against peace and humanity, war crimes, and acts contrary to the purposes and principles of the United Nations.

Paragraph 2(C) is identical to the Convention's exclusion clause 1(F)(b) relating to serious non-political crimes.

[35] However, like analysis under the inclusion clauses, any determination that an asylum-seeker is excluded from refugee status and its accompanying rights and benefits also requires an individualized hearing of the claim. The Court of Appeals properly recognized this:

> "Considering the types of issues raised by Doherty's claim for withholding of deportation, the need for an evidentiary hearing should be obvious. His ultimate success or failure will depend on, among other factors, whether his crimes in Northern Ireland are judged "political" or "non-political", and whether he "persecuted" others on account of their political views or was himself the victim of such persecution. Needless to say, these issues all raise formidable questions of fact that cannot be adequately resolved in the absence of an evidentiary record."

Petition App. 16a-17a.

Both the 1951 Convention and U.S. law provide a methodology for excluding undeserving persons from refugee status. If a full presentation of the facts in this case reveals that Mr. Doherty properly falls under one of these exclusion grounds, he effectively would be excluded from withholding of deportation and asylum.

Under U.S. law, neither withholding of deportation nor refugee status (and thus asylum) is available to those who persecuted others as defined by the statute. Section 243(h)(2)(A) of the INA, 8 U.S.C. § 1253(h)(2)(A); Sections 101(a)(42) and 208(a) of the INA, 8 U.S.C. §§ 1101(a)(42) and 1158(a). Individuals also are ineligible for withholding of deportation under U.S. law if there are serious reasons for considering that they committed a serious non-political crime outside the United States prior to arrival. Section 243(h)(2)(C), 8 U.S.C. § 1253(h)(2)(C). Although the asylum provision of U.S. law does not explicitly provide for this basis of exclusion, Article 1(F)(b) of the 1951 Convention does.

The Attorney General's opinion focused especially on this second exclusion ground regarding serious non-political crimes. The purpose of this exclusion ground, according to international guidelines, is twofold: (1) to protect the community of a receiving country from the danger of admitting a person who has committed a serious common

crime, and (2) to render due justice (*i.e.*, permit the grant of refugee status) to one who has committed a political offense or a less serious common crime.[36]

A central question regarding this exclusion ground here is what constitutes a "non-political" offense. This inquiry is fact-intensive. The *Handbook* provides the following guidance:

> "In determining whether an offence is 'non-political' or is, on the contrary, a 'political' crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature."
>
> "In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has a well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him." [37]

The aim of this exclusion ground, then, is "to obtain a humanitarian balance between a potential threat to the community of refuge and the interests of the individual who has a well-founded fear of persecution." [38] As one commentator has observed, a person "should only be excluded from refugee status if the crimes committed are

[36] *Handbook* ¶ 151.

[37] *Id.* at ¶¶ 152, 156; *see* Goodwin-Gill, *supra*, at 61-62.

[38] Goodwin-Gill, *supra*, at 63.

so serious that the criminal character of the person outweighs his refugee character." [39]

In sum, the analytical framework established by the 1951 Convention, the 1967 Protocol, and the Refugee Act of 1980 already provides the mechanism for determining whether Respondent is excluded from international protection based on past conduct.[40] If the facts ultimately disclose that Respondent participated in the persecution of others under Section 243(h)(2)(A), he would be ineligible for withholding of deportation and asylum under U.S. law, and excluded from refugee status under the 1951 Convention. If ultimately it is determined that there are serious reasons for considering that Respondent committed a serious non-political crime under Section 243(h)(2)(C) which outweighs the degree of persecution feared, he would be ineligible for witholding of deportation, and excluded from refugee status under Article 1(F)(b) of the Convention.

Thus, it is unnecessary for the Attorney General to turn to foreign policy criteria in order to deny asylum to undeserving individuals.

III. THE INTERNATIONAL PROTECTION OF REFUGEES ESTABLISHED BY THE 1951 CONVENTION AND 1967 PROTOCOL IS BASED EXCLUSIVELY ON NON-POLITICAL CRITERIA AND WILL BE UNDERMINED IF GOVERNMENTS DENY ASYLUM ON FOREIGN POLICY GROUNDS.

A. The Protection System Established by the International Refugee Instruments is Based Exclusively on Non-Political Criteria.

While it is unwarranted for this Court to determine whether the Attorney General has the power to make asylum decisions based on foreign policy grounds, if the

[39] 1 A. Grahl-Madsen, *The Status of Refugees in International Law* 297 (1966) (citation omitted).

[40] Due to the serious consequences of exclusion, these clauses must be interpreted in a restrictive manner. *Handbook* ¶¶ 149, 180.

Court chooses to reach this issue, it should affirm the Court below.

Petitioner argues that, since the 1951 Convention and 1967 Protocol do not obligate a Party to grant asylum but only to withhold deportation (*"refoulement"*) to the country of persecution, a State may base its asylum decisions on foreign policy grounds. Pet. Brief at 24-25.

Such a position renders virtually meaningless the politically neutral international definition of "refugee." The Court of Appeals has correctly characterized the non-political character of refugee determinations as follows:

> "Under the protocol and the convention, a person's status as a 'refugee' was determined without regard to political considerations or the country from which the person fled."

Petition App. 20a. It is clear that foreign policy considerations are not a factor in the application of the humanitarian definition of "refugee" under these international instruments.[41]

In their catalogue of refugee criteria, the 1951 Convention and 1967 Protocol set forth no foreign policy ground on which an individual would be either eligible or ineligible for refugee protection. Not even Article 1(F), which provides grounds for excluding an undeserving individual from the protection afforded by the 1951 Convention, contemplates foreign policy concerns among those grounds.

Moreover, because "[t]he purpose of any definition or description of the class of refugees is to facilitate, and to justify, aid and protection . . . ," [42] such a position also eviscerates the purpose and function of the 1951 Convention and 1967 Protocol. In his 1990 Note on International Protection, the High Commissioner emphasized

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[41] *See* Article 1(A)(2) of the 1951 Convention.

[42] Goodwin-Gill, *supra*, at 2.

"that being a refugee and enjoying asylum are inextricably linked. . . . The institution of asylum is thus of critical importance for refugee protection . . . ." [43]

Article 14 of the Universal Declaration of Human Rights plainly states that "everyone has the right to seek and to enjoy . . . asylum from persecution." [44] In its 1977 Conclusions, the Executive Committee expressly appealed to governments to follow liberal practices in granting asylum, an appeal repeated the following year.[45]

The Convention's provision for assimilation and naturalization, which this Court has said corresponds to the asylum provision in U.S. law, *Cardoza-Fonseca*, 480 U.S. at 441, contemplates that parties "shall as far as possible facilitate the assimilation and naturalization of refugees." [46] That is, the Convention looks to a system that resolves the refugee problem *inter alia* at the point of asylum, rather than one which excludes refugees from the grant of asylum based on a ground contraindicated by the international instruments relating to refugees.[47]

In establishing a non-political and humanitarian system, the international community recognized that the

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[43] UN Doc. A/AC. 96/750 (27 August 1990) at ¶¶ 13-14.

[44] Universal Declaration of Human Rights, U.N. General Assembly Resolution 217 A (III), 10 December 1948.

[45] *See* Executive Committee Conclusions No. 5 (XXVIII), *supra*; Executive Committee Conclusions No. 11 (XXIX), Report of the 29th Session of the High Commissioner's Programme, UN Doc. A/AC. 96/559, ¶ 68.1(d). *See also* Executive Committee Conclusions No. 15, *supra* ("States should use their best endeavors to grant asylum to bona fide asylum-seekers").

[46] Article 34 of the 1951 Convention.

[47] The Executive Committee has stressed that the Convention and the Protocol should "be fully implemented according to both the letter and the spirit" in which they were conceived. Executive Committee Conclusions No. 1, *supra*.

situation of refugees has the potential to create foreign policy concerns. Rather than provide foreign policy exclusion grounds as a means for States to deal with the refugee problem, the Convention requires Parties to "do everything within their power to prevent this problem from becoming a cause of tension between States." [48] That is, the Convention not only provides for exclusively non-political criteria in defining "refugee," but it expressly reaffirms the social and humanitarian nature of those criteria by urging States to regard any grant of refugee status as a humanitarian, non-political act, thus attempting to ameliorate foreign policy concerns of countries of asylum.

The Statute of the Office of the UNHCR further supports the principle of the non-political nature of solutions to refugee problems. Pursuant to Chapter I, paragraph 2 of the Statute, the High Commissioner's function of providing international protection to refugees "shall be of an entirely non-political character."

The international refugee-related instruments that have followed the 1951 Convention and 1967 Protocol also have articulated a politically neutral system of refugee status determination and protection. In the Americas, the Cartagena Declaration on Refugees [49] exemplifies the way in which the non-political character of the provisions of the 1951 Convention and 1967 Protocol is being applied equally to asylum and refugee status determinations. The Declaration aimed, *inter alia*, to promote the application of the Convention and the Protocol. In doing so, it "confirm[ed] the peaceful, *non-political* and exclusively humanitarian *nature of* [*the*] *grant of asylum* or recog-

[48] Preamble to the 1951 Convention.

[49] Concluded on November 22, 1984. Portions of this Declaration have been incorporated into the refugee legislation of various governments in Latin America and are currently under consideration for inclusion in other municipal legislation, both in and outside Latin America.

nition of the status of refugee and . . . underline[d] the importance of the internationally accepted principle that nothing in either shall be interpreted as an unfriendly act towards the country of origin of refugees." [50]

In another region of the world, the Organization of African Unity (OAU) sought to reduce or eliminate refugee problems as a source of discord among States in Africa. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa provides that "[t]he grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State." [51]

As one well-known authority has maintained, "because the granting of asylum is not contrary to international friendship, the government of a refugee's country of origin cannot maintain that there exists or should exist such a solidarity between governments as would demand the surrender or expulsion of a refugee." [52]

In short, the refugee status determination system established by the Convention and the Protocol is non-political, and the developing international standards concerning asylum respect this non-political and humanitarian nature of the international protection of refugees.

B. The International System Established to Protect Refugees will be Substantially Undermined if Governments Deny Asylum Based on Foreign Policy Criteria.

If governments disregard the non-political character of refugee protection and deny asylum based on foreign

[50] Cartagena Declaration, Chapter III, ¶ 4, at 34 (English translation) (emphasis added).

[51] Article II of the OAU Convention, 1001 U.N.T.S. 45, 48, No. 14691. The OAU Convention was adopted on September 10, 1969, and entered into force on June 20, 1974.

[52] 2 A. Grahl-Madsen, *The Status of Refugees in International Law* 27 (1972).

policy criteria, they will substantially undermine the international protection system.

It is precisely to eliminate the concern of governments as to the effect of refugee status and asylum determinations upon their relations with others that the Convention, the Protocol, and related international instruments established a non-political, humanitarian system of protection for refugees. The system works with the understanding of States that a recognition of refugee status or a grant of asylum is a humanitarian act, not a political one. Once a discrimination among refugees based on foreign policy concerns is sanctioned by a Party to the Convention or Protocol, that system breaks down.

In view of the politically neutral definition of "refugee" in domestic and international law and developing international standards regarding the institution of asylum, the Court of Appeals concluded:

> "By defining eligibility in politically-neutral terms, Congress made it clear that factors such as the government's geopolitical and foreign policy interests were not legitimate concerns of asylum."

Petition App. 21a.

A politicization of the asylum process in the United States would undermine the ability of UNHCR to carry out the mandate conferred upon it by the international community to protect refugees and asylum-seekers. Such a result from this case would be all the more unfortunate because it is premature and unnecessary.

CONCLUSION

For the foregoing reasons, the Office of the United Nations High Commissioner for Refugees respectfully urges the Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

JULIAN FLEET
FERNANDO CHANG-MUY
UNITED NATIONS
HIGH COMMISSIONER
FOR REFUGEES

Of Counsel:
GUY S. GOODWIN-GILL
RALPH G. STEINHARDT

O. THOMAS JOHNSON, JR.*
ANDREW I. SCHOENHOLTZ
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5170
Attorneys for Amicus Curiae

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* Counsel of Record